Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-551
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266
	)	

FIRST REPORT AND ORDER

Adopted: December 23, 1993; Released: January 28, 1994

By the Commission: Chairman Hundt not participating; Commissioner Duggan issuing a statement.

INTRODUCTION

1. By this action, the Commission completes its review of the pioneer's preference rules with respect to the applicability of any changes in those rules to proceedings in which Tentative Decisions have been issued. Herein we decide to continue to apply our existing pioneer's preference rules to such proceedings and will consider the merits of the individual requests in each of the proceedings affected.[1] With respect to other proceedings, by this action we do not prejudge whether the pioneer's preference rules should be repealed, retained, or amended. We intend to address these remaining issues in a separate Report and Order.

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[1] Three proceedings are within this category. See Establishment of New Personal Communications Services, Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992) (pioneer's preferences tentatively awarded to American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint) and tentatively denied to fifty-three additional applicants in the 2 GHz broadband Personal Communications Services (PCS) proceeding); Establishment of Local Multipoint Distribution Service, Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration, CC Docket No. 92-297, 8 FCC Rcd 557 (1993) (pioneer's preference tentatively awarded to Suite 12 Group (Suite 12) in the 28 GHz Local Multipoint Distribution Service (LMDS) proceeding); and Allocate Bands for Use by Mobile-Satellite Service, Notice of Proposed Rule Making and Tentative Decision, ET Docket No. 92-28, 7 FCC Rcd 6414 (1992) (no tentative pioneer's preferences awarded (five denied) in the 1.6/2.4 GHz Mobile-Satellite Service (MSS) proceeding).

BACKGROUND

2. In the Notice of Proposed Rule Making (Notice)[2] we sought comment on issues related to the effect on the pioneer's preference rules of assigning licenses by competitive bidding.[3] In that context we solicited comment on whether repeal or amendment of our pioneer's preference rules should apply to the three proceedings in which Tentative Decisions, but not final Orders, have been issued.[4]

3. In response to the Notice, American Personal Communications requested that the Commission address early and separately whether to apply to the 2 GHz broadband PCS proceeding[5] any changes or repeal of the pioneer's preference rules.[6] In its request, APC argued that applying to the broadband PCS preference applicants any changes to the rules would be unjust because these applicants have expended substantial resources in reliance on the existing preference rules. APC further argued that repeal would be unlawful because

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[2] Review of the Pioneer's Preference Rules, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

[3] Competitive bidding authority was enacted by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387 (enacted August 10, 1993) (1993 Budget Reconciliation Act). The Commission has proposed rules to implement this authority, see Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, 8 FCC Rcd 7635 (1993).

[4] In the Notice, the Commission decided that any changes in the pioneer's preference rules would not be applied to proceedings in which a final Order has been adopted. There are two such proceedings. One addresses low-Earth orbit satellites that operate below 1 GHz, see Allocate Spectrum For Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, ET Docket No. 91-280, Report and Order, 8 FCC Rcd 1812 (1993). The other addresses 900 MHz narrowband PCS, see Establishment of New Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, First Report and Order, 8 FCC Rcd 7162 (1993), petitions for reconsideration and clarification pending, appeals pending sub nom. BellSouth Corp. v. FCC, No. 93-1518 (D.C. Cir. filed August 20, 1993) and Freeman Engineering Associates, Inc. v. FCC, No. 93-1519 (D.C. Cir. filed August 23, 1993).

[5] GEN Docket No. 90-314, supra note 1.

[6] Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues, ET Docket No. 93-266, filed October 28, 1993.

Congress has not authorized the Commission to retroactively eliminate preferences.[7] APC also argued that applying the existing rules to the narrowband (900 MHz) PCS applicants[8] but not the broadband PCS applicants would be arbitrary because the different treatment would result solely from timing decisions within the Commission's own control. APC further contended that the delay in making final determinations in the broadband PCS pioneer's preference proceeding violated the Commission's rules, which require that pioneer's preference determinations be made at the same time that final rules are adopted in the associated rulemaking proceeding. APC concluded that this delay injures deserving innovators and the public and requested that we address separately on an expedited basis applying the preference rules to broadband PCS.

4. Most parties concur with APC that it would be unfair to apply any modifications to the pioneer's preference rules to the three proceedings in which Tentative Decisions have been made. For example, Henry Geller, the original proponent of the pioneer's preference rules, now supports their elimination, but nevertheless recommends retaining them for the proceedings in which Tentative Decisions have been issued as a matter of equity.[9]

5. With regard to amending or repealing the rules with respect to the 2 GHz PCS preference applicants in particular, Cox

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[7] Additionally, APC argued that applying changed rules to the pioneer's preference applicants in these pending proceedings would constitute unlawful retroactive rulemaking, citing, inter alia, Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988)(Bowen). Several parties concur with APC. Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (AMT/DSST) states that the retroactive application of a repeal of the preference rules must ultimately meet the test of Congressional intent established in Bowen to so apply a statute (AMT/DSST at 12). Similarly, Advanced Cordless Technologies, Inc. (ACT) asserts that the 1993 Budget Reconciliation Act authorizing competitive bidding does not mandate that the Commission take action with respect to the preference rules, and that the Commission lacks authority to apply changes to the rules retroactively (ACT at 3-4). Suite 12 Group (Suite 12) contends that retroactive application of changed pioneer's preference rules to tentative preference grantees would create an adverse effect on the grantees that clearly outweighs the interests that the rules promote (Suite 12 at 17-18).

[8] See First Report and Order, GEN Docket No. 90-314 and ET Docket No. 92-100, supra note 4 (award to Mobile Telecommunication Technologies Corporation) (Mtel).

[9] Geller at 6.

expresses agreement with APC that it would be arbitrary for the Commission to treat the 2 GHz PCS preference applicants differently from the 900 MHz PCS applicants solely because the Commission bifurcated its PCS proceeding and reached conclusions on narrowband issues first. Cox argues that depriving the 2 GHz tentative preference holders of the benefit of their investments will discourage future investment in technical research and erode future confidence in the Commission's commitment to its rules. Further, Cox argues that equity requires that the applications of the PCS pioneer applicants be evaluated consistent with the existing rules.[10] Rockwell International Corporation (Rockwell) concurs that equity requires the 2 GHz PCS preference applications be evaluated on their merits in view of the final order issued with regard to 900 MHz PCS. Rockwell states that 900 MHz and 2 GHz PCS are part of the same proceeding and treating applicants differently merely because of the timing of decisions would be arbitrary.[11] AMT/DSST argues that 2 GHz PCS preference applicants have expended significant efforts and resources, and that repealing the preference rules with respect to these applicants would be inequitable because the public has benefitted from the collective experimentation performed.[12]

6. We have issued Tentative Decisions in two proceedings in addition to 2 GHz PCS. With respect to the 28 GHz LMDS proceeding in which we tentatively awarded a pioneer's preference to Suite 12 Group, Suite 12 argues that if the Commission decides to eliminate or alter significantly the pioneer's preference rules, equity demands that the tentative grants, including that for LMDS, be judged in accordance with the existing rules.[13] With respect to the 1.6/2.4 GHz MSS proceeding in which we tentatively decided that no pioneer's preference award was merited, Motorola Satellite Communications, Inc. (Motorola) argues that there is no reason to change the preference rules as they apply to this proceeding. Motorola states that the recent authorization of competitive bidding does not undermine the basis of the Commission's decision to consider pioneer's preference requests in the 1.6/2.4 GHz MSS proceeding because the MSS applications are not mutually exclusive.[14]

7. Other parties, however, argue that it would be permissible for the Commission to apply modifications to the pioneer's preference rules to existing proceedings. Nextel

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[10] Cox at 8.

[11] Rockwell at 3.

[12] AMT/DSST at 12.

[13] Suite 12 at 15-16.

[14] Motorola at 8.

Communications, Inc. (Nextel) states that the 2 GHz PCS tentative selectees are not entitled to final preferences simply because the Commission made them tentative selectees. Nextel maintains that under the notice and comment rule making procedures involved, the Commission is free to revise, modify, and even reverse its tentative conclusions based on the record developed in response to its solicitation for comments.[15] Paging Network, Inc. (PageNet) states that under established legal precedent, the Commission has the authority to change the eligibility rules to the detriment of pending applications.[16] PageMart, Inc. (PageMart) asserts that Congress has made clear that the Commission has broad discretion to modify the preference rules in light of competitive bidding authority, including the discretion to change the nature of the award or the conditions precedent for receipt of the award.[17]

8. Some parties also argue that if licensees generally will be selected using competitive bidding it would be more equitable to charge pioneers in proceedings in which Tentative Decisions have been made. BellSouth states that whether the preference policy is eliminated or modified, the narrowband and broadband PCS grantees should pay competitive bidding prices. BellSouth notes that Congress specifically provided that competitive bidding could apply to pending applications as well as those not yet filed.[18] PageMart contends that preferences were not intended to result in a financial windfall and argues that other licensees will be disadvantaged by a preference grantee's ability to capitalize on the earlier certainty of its license and further handicapped if they are forced to shoulder a financial burden that is not imposed on the preference grantees with whom they compete.[19] Finally, Southwestern Bell Corporation (SBC) maintains that preference grantees should pay a price equivalent to that paid by those obtaining their license at auction prices because compensation to the public should be required for use of the spectrum.[20]

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[15] Nextel reply comments at 6-7.

[16] PageNet at 9, citing United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[17] PageMart at 6, citing the 1993 Budget Reconciliation Act, § 6002(a); H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., at 485 (1993).

[18] BellSouth at 13-14, citing the 1993 Budget Reconciliation Act, § 6002(e).

[19] PageMart at 6.

[20] SBC at 5-6.

DISCUSSION

9. We conclude that it would be inequitable to apply any changes in our rules to pending proceedings in which Tentative Decisions have been issued.[21] Notwithstanding that other licensees in the three proceedings at issue may have to pay for their licenses,[22] preference applicants in these proceedings have submitted their requests and publicly disclosed substantial detail of their system designs in reliance on the continued applicability of the pioneer's preference rules.[23] We have evaluated their requests based on existing rules and issued Tentative Decisions, and parties have expended not inconsiderable resources to further argue the merits or demerits of the requests and our tentative conclusions addressing the requests. Had the rules been different, these applicants might have structured their requests differently; or conducted research, development, and experimentation differently; or elected not to disclose detailed information about their systems. We conclude that notwithstanding our legal authority to treat 2 GHz broadband PCS pending applicants differently than the 900 MHz narrowband PCS pioneer (Mtel) and also to apply changed rules prospectively to pending applicants in the 28 GHz LMDS and 1.6/2.4 GHz MSS proceedings,[24] to do so would be inequitable in these three

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[21] We previously determined that, as a matter of equity, nothing in our pioneer's preference review will affect the narrowband PCS proceeding and we adhere to that decision. See Notice at para. 18.

[22] However, as noted by Motorola, competitive bidding may not apply to the 1.6/2.4 GHz MSS proceeding if license applications are determined not to be mutually exclusive.

[23] In the Notice at para. 10 comment was requested on whether we legally are permitted to charge for a license obtained through the pioneer's preference process if a license continues to be guaranteed. Without reaching that statutory issue, in the Notice at para. 18 and footnote 19 we agreed not to apply any rules changes in the two proceedings in which final decisions had been issued, and herein agree to extend the same treatment to the three proceedings in which Tentative Decisions had been issued. Declining to apply possible changes in our rules to all of these proceedings includes declining to levy charges based upon competitive bids as determined by other methods, as suggested by BellSouth, PageMart, and SBC, supra para. 8.

[24] The Commission legally may modify the rules applicable to applicants and proceedings in which final decisions have not been made. Applying modifications to the pioneer's preference rules prospectively to pending pioneer's preference requests would not constitute retroactive rulemaking. See Bowen 488 U.S. at 219-220 (J. Scalia concurring) (rules are retroactive if they "alter the

proceedings. Accordingly, we will render final decisions on pioneer's preference requests in these proceedings based on the existing pioneer's preference rules. Further, we concur with APC that it is in the public interest to reach an early decision in the 2 GHz broadband PCS pioneer's preference proceeding. Therefore, we today are taking final action in that proceeding.[25]

CONCLUSION

10. This action concludes our review of the pioneer's preference rules with respect to proceedings in which Tentative Decisions have been made. We anticipate concluding our review of the pioneer's preference rules with respect to other proceedings in a separate Report and Order.

Ordering Clause

11. Accordingly, IT IS ORDERED that this First Report and Order IS ADOPTED. IT IS FURTHER ORDERED that the Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues, filed by American Personal Communications, IS GRANTED to the extent indicated herein. This action is taken pursuant to

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past legal consequences of past actions" or "change what the law was in the past," not simply because they "affect" past transactions (emphasis in original); Association of Accredited Cosmetology Schools v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992) (a rule is retroactive only if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past"); Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989) (the fact that a rule change results in "expectations [being] frustrated" does not make it retroactive). It also is well-established that new rules affecting eligibility can be applied to pending applicants. See Hispanic Info & Tel. Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

[25] See Third Report and Order, GEN Docket No. 90-314, FCC 93-550, adopted December 23, 1993 (pioneer's preferences awarded to APC, Cox, and Omnipoint and denied 47 additional applicants).

Sections 4(i), 7(a), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

Separate Statement
of
Commissioner Ervin S. Duggan

Re: Review of the Pioneer's Preference Rules, ET Docket No. 93-266, First Report and Order; Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 et al., Third Report and Order.

It is no secret that I have long been a skeptic about the wisdom of the FCC's pioneer's preference policy. In this review docket, which sought to confront concerns about whether the pioneer's preference policy made sense in connection with our new auction authority, the proponents of pioneer's preferences have convinced me that the policy has indeed spurred innovation and investment in new technology. I therefore support retaining the pioneer's preference policy, at least for existing tentative selectees. If sparingly awarded, such preferences should help generate the technological innovation that the Commission hoped for when it created the policy.

I always granted that the pioneer's preference policy was noble in concept. My concerns have been limited to the practical difficulties that could arise in implementing the policy. At the outset, I identified several potential dangers: the danger of politicizing awards; the danger of making difficult, hair-splitting decisions about what constitutes true innovation; and finally, the danger of being caught up in endless litigation, which obviously might slow, rather than speed, the commercial advent of new technologies.[1]

The commenters in this proceeding and our actual experience, however, suggest to me that the benefits of the pioneer's preference policy outweigh the dangers it may threaten, at least with respect to those proceedings in which the FCC already has reached tentative or final decisions. And I grant that a decision to award preferences here is true to the expectations that the Commission created when it established the pioneer's preference scheme: that innovators would be rewarded with the grant of a license enabling them to use and profit from their innovations.

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[1] See Amendment of the Commission's Rules to Establish New Personal Communications Services (GEN Docket No. 90-314), Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794, 7815 (1992); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services (GEN Docket No. 90-217), Report and Order, 6 FCC Rcd 3488, 3500 (1991).

I do want to emphasize, however, that pioneer's preferences should, in my judgment, be awarded in a most austere and sparing fashion. Nobel prizes would be devalued if they were too easily won. So too, pioneer's preferences should be granted only to those who cross a high threshold; otherwise their meaning and purpose will be diluted. A conservative approach to such awards also should minimize the dangers that I identified when first we embarked on this enterprise.

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